

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 05-0240P
TAX ADMINISTRATION—CIVIL FRAUD PENALTIES FOR
THE REPORTING PERIODS COVERING 1996—2003**

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ISSUE

I. Tax Administration—Civil Fraud Penalties—Failure to File Returns

II. Tax Administration—Civil Fraud Penalties—Failure to Make Full Tax Payments with Returns

Authority: IC §§ 6-2.5-6-7, -9-3 and -8-1-24 (1993) (1998) (current respective versions at *id.* (2004)); IC §§ 6-8.1-5-1(a) and (e), -2.5, -10-2.1, -10-4 and -10-7 (2004); *State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257 (Ind. 2002); *Ind. Dep't of State Revenue v. Safayan*, 654 N.E.2d 270 (Ind. 1995); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018 (Ind. Tax Ct. 1999); 45 IAC §§ 2.2-6-8(b) and -9-4(a) (1996) (2001) (current respective versions at *id.* (2004)); 45 IAC §§ 15-5-7(f)(3) and -11-4 (2004)

The taxpayer has asked for a waiver or reduction of the 100 percent fraud penalties the Audit Division of the Department has proposed to assess against him.

STATEMENT OF FACTS

The taxpayer is an individual retail merchant engaged in the sale at retail of vehicle tires and tire-related accessories. The taxpayer also performs tire installation, alignment and repair services. He had operated his business as an Indiana-chartered corporation from July 15, 1983, according to the records of the Business Services Division of the Indiana Secretary of State's office. That corporation began filing Sales and Use Tax Vouchers (Forms ST-103) with this Department with the reporting period ending July 31, 1983. The Secretary of State administratively dissolved the corporation effective December 31, 1987. Notwithstanding that dissolution, the present individual taxpayer has continued to hold himself out to third parties, including this Department, as being a corporation.

The Department conducted a gross retail (sales) and use tax field audit of the taxpayer's putative corporation for calendar years 1996-2003 (hereinafter "the audit period"). The auditor made no adjustments to the taxpayer's use tax liability for the audit period or to the taxpayer's sales tax

liability for 2002. However, the auditor made adjustments to the taxpayer's sales tax liability for every other year of the audit period. The audit Summary states that the taxpayer failed to file Forms ST-103 or to remit collected sales to the Department on several occasions during those years. The auditor also recommended, and the Audit Division proposed, assessing the 100 percent civil fraud penalty on the proposed liabilities resulting from his base tax adjustments. The Audit Division issued the Notices of Proposed Assessment arising from all of these adjustments in the name of the taxpayer's putative corporation rather than the taxpayer individually. The taxpayer, in his individual name, made a timely protest of only the civil fraud penalties.

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DISCUSSION

A. TAXPAYER'S ARGUMENT

The taxpayer states in his protest letter that he should pay a penalty, but that it should be for a reduced percentage of the base tax proposed assessments. In support of his request the taxpayer's only statement, which strictly speaking is not an argument, is that paying the penalties in a reduced percentage "would really help," implying that paying the full amounts of the fraud penalties would be a financial hardship to him. He had indicated to the field auditor that he would be forced into bankruptcy if he had to pay more than a ten percent penalty and would request to be put on a payment plan.

B. ANALYSIS

The sales tax is a trust fund tax. IC § 6-2.5-9-3 (1993) (1998) and 45 IAC § 2.2-9-4(a) (1996) (2001) (current respective versions at *id.* (2004)); *see also Ind. Dep't of State Revenue v. Safayan*, 654 N.E.2d 270, 272 (Ind. 1995) (so stating and quoting IC § 6-2.5-9-3). A retail merchant is absolutely liable for the sales tax on its total gross retail income from taxable transactions for a reporting period, "regardless of the amount of tax he actually collects." IC § 6-2.5-6-7 and 45 IAC § 2.2-6-8(b).

IC § 6-8.1-10-4 (2004) is the section of the Tax Administration Act, IC article 6-8.1, that imposes a penalty for civil fraud. That penalty is 100 percent of the full amount of tax due for any period for which the taxpayer fails to file a return, or of the unpaid balance of tax reported on any filed return, if the taxpayer fails to file or pay "with the fraudulent intent of evading the tax[.]" *Id.*(a). One of the implementing regulations, 45 IAC § 15-11-4 (2004), describes "the [kind of] intent required [to constitute fraud as having] the specific purpose of evading tax believed to be owing." *Id.* Civil tax fraud in Indiana is thus what lawyers call a "specific intent" offense. *Cf.* IC § 6-8-1-24 (requiring intent to defraud the state or to evade payment of tax for certain actions described therein to be criminal tax offenses).

The one hundred percent civil penalty is the maximum penalty the Department can assess. IC § 6-8.1-10-7. It “is imposed in place of and not in addition to the penalty imposed under section 2.1 of this chapter[i.e., IC § 6-8.1-10-2.1 governing the negligence penalty].” IC 6-8.1-10-4(d). Since IC § 6-8.1-10-2.1 thus does not apply to the civil fraud penalty. That being the case, a taxpayer against whom the latter penalty is assessed cannot use the procedure set out in IC § 6-8.1-10-2.1(d) and (e) to prove the existence of such “reasonable cause[,]” *id.*, for the taxpayer’s actions as would require the Department to waive that penalty.

Thus, a taxpayer assessed with a civil fraud penalty must prove that it did not commit fraud at all. Specifically, the taxpayer must submit evidence that disproves the existence of one or more of the material facts (what lawyers call “elements”) that together constitute fraud. Title 45 IAC § 15-5-7(f)(3) lists and describes the elements applicable to fraudulent failure to file a return, and 45 IAC § 15-11-4 does so for fraudulently made tax underpayments. If the taxpayer fails to prove it did not commit civil fraud as described in the applicable regulation/s, the Department has no authority to waive the penalty.

All the present taxpayer has done in this protest is to make a vague plea for the Department to reduce the penalty to a percentage he can bear, a request that is more properly directed to the Department’s Taxpayer Advocate than to the Legal Division. He has submitted no actual evidence whatever, much less evidence that would disprove that he committed fraud, or at the very least evidence that his failures to file returns and pay tax were without fraudulent intent.

Indiana law is settled that this state’s taxation hearing officers, and by extension the state-level taxing authorities of which they are agents, “do not have the duty to make a taxpayer’s case.” *Hoogenboom-Nofziger v. State Bd. of Tax Comm’rs*, 715 N.E.2d 1018, 1024 (Ind. Tax Ct. 1999), *cited with approval in State Bd. of Tax Comm’rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257, 1264 (Ind. 2002). The Tax Court stated its rationale for this rule in *Hoogenboom-Nofziger* as follows:

[T]o allow [a taxpayer] to prevail after it made such a cursory showing at the administrative level would result in a tremendous workload increase for [the Department and] the State Board [now the Indiana Board of Tax Review]...administrative agenc[ies] that already bear[]...difficult burden[s] in administering this State's [listed and] property tax system[s]. If taxpayers could make a de minimis showing and then force [the Department or] the State Board to support its decisions with detailed factual findings, the [Indiana taxing authorities] would be overwhelmed with cases such as this one. This would be patently unfair to other taxpayers who do make detailed presentations to the [taxing authorities] because resolution of their appeals would necessarily be delayed.

715 N.E.2d at 1024-25. Considering the total absence of evidence negating fraud, legal relief from the proposed civil fraud penalties is thus impossible. Even if it were possible such relief would be inappropriate given the trust fund nature of the sales tax as discussed at the beginning of this Analysis.

Lastly, the Legal Division notes that the Audit Division issued the Notices of Proposed Assessment to the former corporation, which was dissolved before the audit period began and thus could not be the responsible taxpayer. However, IC § 6-8.1-5-4 permits the Department to issue a new assessment or assessments to the taxpayer that is responsible, and for this purpose makes inapplicable the assessment period of limitations of IC § 6-8.1-5-2(a) that would otherwise govern. In addition, IC § 6-8.1-5-2(e) states in relevant part that if a taxpayer does not file a return (with or without fraudulent intent), there is no period limiting when the Department can issue a proposed assessment against that taxpayer for the reporting period the return would have covered. There is thus no legal impediment to the Audit Division to issue the Demand Notices for the proposed assessments to the individual taxpayer rather than to the former corporation. The Legal Division therefore directs the Audit Division to do so accordingly.

FINDING

The taxpayer's protest is denied. The file is to be returned to the Audit Division to issue the Demand Notices for the proposed assessments to the individual taxpayer rather than to the former corporation.